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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 807

CITY OF WEST ALLIS, VILLAGE OF WEST MILWAUKEE, and CITY OF SOUTH MILWAUKEE, all municipal corporations; ARNOLD H. KLENTZ, PHIL ELLIOTT, ERNEST J. TERRIEN, JOSEPH TABUSHING, CHESTER W. GROBSCHMIDT, and LOUIS A. LANGE,

Petitioners,

vs.

COUNTY OF MILWAUKEE, in the State of Wisconsin,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

Petitioners pray that a writ of certiorari be issued to review the judgment of the Supreme Court of the State of Wisconsin entered in the above case on June 7, 1968.

OPINIONS BELOW

The opinion of the Supreme Court of Wisconsin is reported at 39 Wis. 2d 356, 159 N.W. 2d 36. Petitioners' motion for rehearing was denied without opinion.

JURISDICTION

The judgment of the Supreme Court of Wisconsin was made and entered on June 7, 1968 [R. 151], and a copy thereof is appended to this petition in the Appendix at

p. 13. The Order denying Petitioners' motion for rehearing was made and entered on September 9, 1968 [R. 171], and a copy thereof is appended to this petition in the Appendix at p. 13. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3); to wit:

> ". . . where any . . . right . . . is specially set up or claimed under the Constitution . . . of . . . the United States."

QUESTIONS PRESENTED

1. Does Due Process bar a Court from sustaining a demurrer to a complaint upon the basis of a rejection of allegations of fact contained therein, without taking judicial notice of any facts contrary to the allegations and without affording Plaintiff an opportunity to present its evidence in support of the allegations?

2. Does Due Process bar a state's highest appellate court from affirming a lower court's sustaining of a demurrer by taking judicial notice in its opinion of a determinative "fact" which (a) is not subject to be known to a verifiable certainty; (b) has not been previously noticed to Plaintiff and (c) Plaintiff is not thereafter afforded the opportunity to present evidence to disprove?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 14, §1, U.S.C.A. Provides:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

STATEMENT

Petitioners are three municipalities located in Milwaukee County, Wisconsin, and six taxpayers residing therein. This action was commenced by Petitioners in Wisconsin's Circuit Court for Milwaukee County. Petitioners asked for a declaratory judgment that, among other things, Milwaukee County's (hereinafter referred to as Respondent) proposed county bond issue for the construction of a county incinerator facility was unconstitutional. Petitioners' request was based upon four causes of action, but this petition relates only to the third cause of action.

The critical allegations of fact in the third cause of action were those in Paragraph 19 of the Complaint:

> ". . . none of the plaintiff municipal corporations or taxable property situated therein will derive any benefit from the issuance of said bonds or the construction of facilities for which the bonds are issued; nor will any benefit be derived by other municipalities which have their own facilities or have contracted therefor." (R. 149)

plus those in Paragraphs 8 and 9 to the effect that there are in existence in Milwaukee County sufficient incinerator facilities and contractual arrangements for such facilities, to service all the territory in said County. [R. 145-6]

Petitioners contended that the aforesaid allegations rendered the proposed bond issue unconstitutional for two separate reasons:

1. The bond issue will violate the constitutional requirement that there be a public purpose for municipal financing, which emanates from the constitutional requirement for a republic form of government and was recognized in *Heimerl v. Ozaukee County,* 256 Wis. 151, 40 N.W. 2d 564 (1949).

2. Since the Wisconsin Legislature in Section 59.07, Wisconsin Statutes only gave the power to build County incinerator systems to Milwaukee County, said Statute violates Wisconsin Constitution, Article IV, Section 23, which requires that the "legislature shall establish but one system of . . . county government which shall be as nearly uniform as practicable."

Respondent demurred, to Petitioners' Amended Complaint. The Circuit Court in an Order dated September 20, 1967, sustained the demurrer with respect to the third cause of action, not on the ground that it failed to allege a cause of action, but, even though Petitioners had not been given the opportunity to present any evidence to support their allegations, because:

1. (As to contention No. 1), there is an assumption of constitutionality and "the invalidity of the statute here is not apparent beyond a reasonable doubt." [R. 138-9, App. 37-8]

2. (As to contention No. 2), the system of county government was as nearly uniform as practicable. [R. 126, App. 29]

Petitioners appealed from the aforesaid Order to the Wisconsin Supreme Court. Petitioners argued with respect to the sustaining of the demurrer to the third cause of action that the Circuit Court erred because:

1. (As to contention No. 1), it failed to make any proper findings of fact to support its conclusion and failed to allow Petitioners an opportunity to support their allegations of fact with evidence.

2. (As to contention No. 2), it concluded that it was not practicable for the legislature to grant the

power to construct county incinerator systems to all counties or no counties, without making any proper findings of fact to support it and without giving Petitioners the opportunity to present any evidence to support their allegations.

The Supreme Court of Wisconsin on June 7, 1968 filed its opinion affirming the Circuit Court's Order, not on the ground that the third cause of action failed to allege a cause of action, but because:

1. Despite Petitioners' allegation that no one will "benefit" from the construction of the county incinerator system, "we are not convinced beyond peradventure that this is so, nor if it is so now, that it will continue to be in the future contemplated by the legislature", and thus it is not "clear and palpable that there can be no benefit to the public." [R. 168-9, App. 21]

2. It was impracticable for the legislature to give this power to any other County or to no County in Wisconsin, because the Court takes "judicial notice" of, among other things, the "fact" that "refuse problems are directly related to the concentration of population" and thus there was no "patent unreasonableness" as to the presumed determination of impracticability made by the Legislature. [R. 164-5, App. 18-9]

Petitioners made a motion for a rehearing on the ground, among others, that the Wisconsin Supreme Court's decision violated the Due Process guarantee of the 14th Amendment of the United States Constitution, because the Court:

1. refused to accept for purposes of demurrer the truth of Petitioners' allegations that no one in the County will benefit from the construction of the pro-

posed County incinerator system and affirmed the sustaining of Respondent's demurrer on the ground that it is not "clear and palpable" that there can be no benefit to the public from its construction, without even giving Petitioners an opportunity to present evidence to support its allegations of no benefit;

2. in its opinion took judicial notice of the purported "fact" that "refuse problems are directly related to the concentration of population," without any prior notice and without giving Petitioners the opportunity to present evidence which it is confident will disprove the existence of this so called "fact."

On September 9, 1968, the Supreme Court of Wisconsin announced its decision denying Petitioners' motion for a rehearing, without delivering any opinion. [R. 171]

REASONS FOR GRANTING THE WRIT

The petition for a Writ of Certiorari should be granted because the decision of the Wisconsin Supreme Court violates the Petitioners' right, guaranteed by the 14th Amendment of the United States Constitution, not to be deprived by "any State" of their "property, without due process of law". The Circuit Court's sustaining of the demurrer to Petitioners' third cause of action was not affirmed because it failed to allege a cause of action. The Court based its affirmance squarely upon the rejection of the allegations in Petitioners' Amended Complaint that no one will benefit from the proposed County incinerator system because there are sufficient facilities to service the entire County and upon a taking of judicial notice of a determinative "fact" that is not subject to being known to a verifiable certainty.

1.

DUE PROCESS BARS A COURT FROM REJECTING THE TRUTH OF A PLAINTIFF'S ALLEGATIONS OF FACT WITHOUT HEARING ANY EVIDENCE OR TAKING JUDICIAL NOTICE OF ANY FACTS CONTRARY THERETO; AND THEN SUSTAINING A DEMURRER TO THE COMPLAINT.

The Wisconsin Supreme Court's determination that there was a proper "public purpose" for the proposed County incinerator system was based upon its conclusion that it was not "convinced beyond peradventure" that no one will derive any benefit from it, despite Petitioners' allegations to that effect. [R. 16] Petitioners have never had an opportunity in any court to present its evidence which will prove the truth of these allegations of fact. Further, the Court in rejecting the truth of these allegations did not rely upon any "facts" of which it took judicial notice.

Unless due process bars courts from deciding lawsuits in such a manner, the right of the people of this country to seek redress and justice through judicial processes is an illusory and hollow one. The Court maintained it was not "convinced beyond peradventure" that no benefit will be derived from the County incinerator system. But Petitioners did everything permissible at this stage of the proceedings to "convince" the Court of this "fact". First of all it alleged the absence of benefit as a fact in its Amended Complaint. Secondly, it requested at all stages of the proceedings to be allowed to present its evidence to prove its allegations.

This must be held, as a matter of due process, to be enough to defeat a demurrer and entitle a litigant to a

hearing at which it can present its evidence. Failure to so hold would allow the courts of this country to reject the allegations of fact contained in a litigant's pleadings, upon the mere basis of "doubts" as to their truthfulness, which exist for unspecified reasons, not supported by any "facts" in the record. If this "procedure" were held by this Court to be constitutionally permissible, the substantive constitutional and statutory rights guaranteed to the people of this country would ultimately rest solely upon the uneasy sands of judicial "doubts". This in turn will destroy the right itself. For if the people can be barred from presenting their evidence in a court to prove that a right has been violated, the right itself is meaningless.

This Court at an early date recognized the irreconcilable conflict between this latter mode of deciding lawsuits and the fundamental principles of due process. In *Saunders v. Shaw,* 244 U.S. 317, 37 Sup. Ct. 638 (1917), Mr. Justice Holmes writing for a unanimous court held that it was a violation of the due process guaranteed by the Fourteenth Amendment for a Supreme Court of a state to render a final decision in an action for an injunction to restrain the collection of a drainage tax upon the basis of a proposition of fact without allowing plaintiff an opportunity to present his evidence to disprove the existence of this fact. In that case, the proposition of fact was substantially identical to that involved herein, since it was that plaintiffs' land would be benefited by a proposed drainage project.

2.

DUE PROCESS BARS THE SUPREME COURT OF A STATE FROM TAKING JUDICIAL NOTICE OF A PURPORTED "FACT" THAT IS DETERMINATIVE OF THE DISPOSITION OF THE APPEAL AND IS NOT A "VERIFIABLE CERTAINTY", WITHOUT FIRST GIVING LITIGANTS NOTICE OF WHAT IT INTENDS TO DO AND AN OPPORTUNITY TO PRESENT EVIDENCE TO DISPROVE THE "FACT".

The critical "fact" upon which the Wisconsin Supreme Court determined that it was impracticable for the Legislature to either give all counties or no counties the power to construct county incinerator systems was that "refuse problems are directly related to the concentration of population". The Court took "judicial notice" of this "fact" in its opinion, with no prior notice to Petitioners; with no indication from what source it derived this "fact"; and without giving Petitioners the opportunity to present its evidence that will disprove this "fact".

This assertion is, of course, at the center of this part of the lawsuit and Petitioners are confident they can present sufficient evidence to disprove the existence of this "fact", if given an opportunity to do so. Petitioners believe they can prove that, while the amount of refuse in a given geographical area is admittedly greater when there is such a concentration of population as exists in Milwaukee County, the taxes available for dealing with and disposing of this refuse is also greater in a populous county like Milwaukee; and therefore the resultant "refuse *problems*" in a heavily populated county are no greater than in a sparsely populated county.

Due Process demands that the courts in this country be barred from deciding a lawsuit by taking judicial notice of a purported "fact" in this manner. This "fact" was not a proper subject of judicial notice since it was not subject to being known to a "verifiable certainty". Only a trial type hearing at which evidence is introduced can result in the existence or non-existence of this type of "fact" being settled in a just and realistic manner.

If Due Process allows "judicial notice" to be taken of such debatable, complicated and critical "facts" as this in order to sustain a demurrer to a complaint then the so-called constitutional "right" to a day in court is nothing but an empty crucible. The extent of this right will be merely to have a court "decide" what the "facts" are, without even having to hear and consider the evidence a litigant has to support its position. Thus, a Court could take "judicial notice" of the "fact" that the proposed construction of a sewer system will "benefit" the community, without even being required to hear and consider a litigant's evidence establishing that the proposed system will in point of fact be built in an uninhabited marsh.

The Wisconsin Supreme Court utilized the doctrine of judicial notice in precisely the same manner, as was denounced by this Court in *Ohio Bell Tel. Co. v. Comm'n.*, 301 U.S. 292, 57 Sup. Ct. 724 (1937), as a deprivation of due process. In that case the Commission, without prior notice to Appellant, based its decision upon purported "facts" that it took judicial notice of in its final report. Appellant requested that the Commission indicate what sources were adverted to in taking judicial notice of the "facts" and that it be allowed to rebut the "facts". The Commission denied this request and the Supreme Court of Ohio affirmed. The United States Supreme Court re-

versed on the ground the procedure utilized was a denial of the Due Process guaranteed by the Fourteenth Amendment. Mr. Justice Cardozo writing for a unanimous court stated:

> "This is not the fair hearing essential to due process. It is a condemnation without trial.
>
> An attempt was made by the Commission and again by the state court to uphold this decision without evidence as an instance of judicial notice. . . Our opinions have been much misread if they have been thought to point that way. Courts take judicial notice of matters of common knowledge. . . Moreover, notice, even when taken, has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence. . . 'It does not mean that an opponent is prevented from disputing the matter by evidence if he believes it disputable. . . Such at least is the general rule, to be adhered to in the absence of exceptional conditions. . . Even so, to press the doctrine of judicial notice to the extent attempted in this case and to do that retroactively after the case had been submitted, would be to turn the doctrine into a pretext for dispensing with a trial." (301 U.S. at 300-2)

CONCLUSION

The issues raised by this Petition lie at the heart of procedural Due Process. The decision of the Wisconsin Supreme Court was reached by utilizing procedures for finding "facts" that are directly contrary to the constitutional principles embodied in the holdings of two decisions of this Court. The continued vitality of these principles is essential to the maintenance of a fair and meaningful system of justice in this country. Erosion of these principles cannot be tolerated. This Court should

grant the Writ and affirm once again that this Court will strike down any invasions of these basic constitutional rights, whenever, wherever and however they might appear.

Respectfully submitted,

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APPENDIX

JUDGMENT

(Formal parts omitted)

This cause came on to be heard on appeal from the order of the Circuit Court for Milwaukee County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the order of the Circuit Court for Milwaukee County herein be, and the same is hereby, affirmed.

ORDER DENYING MOTION FOR REHEARING

(Formal parts omitted)

The Court being now sufficiently advised of and concerning the motion of the said appellants for a rehearing in said cause, it is now here ordered that said motion be, and the same is hereby, denied, with costs.

OPINION

(Those portions of the opinion relating to two other causes of action not involved in this petition, have been omitted)

APPEAL from an order of the circuit court for Milwaukee county: ELMER W. ROLLER, Circuit Judge. *Affirmed.*

This is an action brought by the city of West Allis and other municipalities and private citizens of Milwaukee county, seeking by declaratory judgment to hold unconstitutional a grant of power to Milwaukee county to construct an incinerator and waste-disposal system and to

levy property taxes to pay for the construction. The county of Milwaukee demurred to the complaint. The city of West Allis and the other plaintiffs alleged four causes of action.

The demurrer to one cause of action, which alleged that the county legislation had not been passed at a proper meeting, was overruled. That question, however, is not before us on appeal.

The county of Milwaukee's demurrer as to three causes of action was sustained by order of the circuit court. The plaintiffs have appealed from that order.

This case arises out of legislation enacted by the Laws of 1957, ch. 328, which authorized any county with a population in excess of 500,000 to purchase land and to construct physical plants for refuse disposal. Sec. 59.07 (52) (b), Stats., provided that municipalities making use of the county facilities were to pay fees commensurate with the cost of the services rendered. Ch. 328 of the Laws of 1957 also created sec. 67.04 (1) (w), authorizing Milwaukee county to issue general obligation bonds to finance the construction of an incinerator system.

It is alleged in the complaint that the plaintiff municipalities and all other municipalities in Milwaukee county have either constructed or acquired waste-disposal and incinerator facilities or have contracted for such facilities at local municipal expense.

The legislation authorizing Milwaukee county to construct and finance waste-disposal facilities remained unused until 1967, when the county board adopted a resolution to borrow $5,500,000 for the acquisition of land and for the construction of a county-wide incinerator system. On March 21, 1967, the county board, pursuant to sec.

67.04(1)(w), Stats., authorized the sale of general obligation bonds, to be paid by a tax on all property in Milwaukee county.

It is the contention of the plaintiffs that the statute authorizing the county to build an incinerator system and to tax all the taxpayers of the county therefor is unconstitutional. The plaintiffs urge that, under art. XI, sec. 3, of the Constitution, the construction of waste-disposal facilities is a "local affair" and that taxing all property in the county will have the effect of making it impossible, as a practical matter, to finance municipal refuse-disposal systems; and that, thus, the state, by this legislation, has authorized the county to defeat a constitutional power of a city to operate its own facilities. Plaintiffs also allege that the grant of this authority to Milwaukee county alone and the concomitant power to tax violates art. IV, sec. 23, which requires that there shall be but one system of county government, which shall be as nearly uniform as practicable. They also urge that, because the municipalities have historically had the right to provide their own refuse-disposal facilities and have exercised that right, the field of refuse disposal has been preempted by the municipalities and the county is precluded from such activities. As a corollary to this argument, it is contended that, because there is no need for additional refuse-disposal facilities, no one will be benefited by the construction of a county facility; and, hence, the county's expenditure violates the public-purpose doctrine.

* * *

Does the delegation of the power to construct and finance refuse-disposal plants only to counties having a population of 500,000 or more violate art. IV, sec. 23, of the Constitution.

Sec. 23 provides:

"The legislature shall establish but one system of town and county government, which shall be as nearly uniform as practicable. . . ."

In the case of *State ex rel. Milwaukee County v. Boos* (1959), 8 Wis. 2d 215, 99 N.W. 2d 139, the law creating a county executive for Milwaukee county was upheld in its significant respects. The issue there, as here, was whether it was proper to confer special powers upon counties having a population of 500,000 or more. The court therein pointed out that two aspects of the constitutional amendment were involved: (1) that there shall be but one system of county government established, and (2) that the systems adopted shall be as nearly uniform as practicable. In *Boos* we said that, although the system itself must be unvarying, nevertheless, insofar as specific duties are devolved upon counties, certain variations were possible. The particulars of county government from county to county may vary, but the nature of the county government was to be the same throughout the state. This court in *Boos* held that Milwaukee county, with a population in excess of 1,000,000, justified a classification in which the specific duties of the county could vary from that of counties not within the classification. It is well established that counties may be classified on the basis of population, providing there is a reasonable basis for this treatment; only the essential nature of the county government must remain uniform. In *Adams v. Beloit* (1900), 105 Wis. 363, 369, 81 N.W. 869, we stated:

"Classification by statute must be based upon some substantial and real differences of situation. It must be a distinction germane to the purpose of the law. It must not be based on existing circumstances only, so as to preclude additions to the class, and any law relating to the class may apply to all members of the class."

These rules of classification were made applicable to counties in the case of *Bingham v. Board of Supervisors of Milwaukee Co.* (1906), 127 Wis. 344, 348, 106 N.W. 1071.

The same rule was followed in *State ex rel. Scanlan v. Archibold* (1911), 146 Wis. 363, 131 N.W. 895. That case concluded that, if the rules of classification are complied with, there may be a class presently comprising but one county.

In the case of *Hjelming v. La Crosse County* (1926), 188 Wis. 581, 206 N.W. 885, the legislature attempted to confer certain powers on all counties containing cities of the third class. In that particular case the purpose of the law was to grant certain power in respect to the diking and controlling of rivers. The court held that there was no reasonable relationship between the problem of river and flood control and the fact that the county contained a city of a certain size. The classification was arbitrary and unreasonable and not germane to the purpose of the law.

The *Boos Case, supra,* also pointed out that changes in county government may be made where it is not practicable to carry on the usual government in a particular class of counties, provided there is a reasonable basis for diversity.

At the outset, in this case, we are confronted with the legislative finding that appears in sec. 59.07 (52) (b), Stats., that, "The powers conferred by this paragraph are declared to be necessary to the preservation of the public health, welfare and convenience of the county." We have said that such legislative findings are entitled to great weight and will not be upset unless patently unreasonable. *Wagner v. Milwaukee* (1923), 180 Wis. 640, 192 N.W.

994; *David Jeffrey Co. v. Milwaukee* (1954), 267 Wis. 559, 66 N.W. 2d 362.

It appears then that the government of one county may vary from that of the others, provided the system remains untouched, and that in their details the governments vary only to the extent that it is impracticable for them to be uniform. The classifications must be reasonable. Applying these tests to the instant case, we find no improper classification.

Although this matter is before us on demurrer, we are not obligated to close our eyes to all facts except those set forth in the complaint. It was so contended in *State ex rel. Scanlan v. Archibold, supra,* page 370. We said therein:

"This position is untenable. The law must be tested as to its constitutionality by its language in the light of such matters as the court will take judicial notice of."

It is undisputed, and we take judicial notice of the fact, that Milwaukee county is a metropolitan, urban area and the only one in the state of Wisconsin in which town government has wholly ceased to exist. Its population approximates 1,000,000, and it is ineluctable that refuse problems are directly related to the concentration of population. We also are compelled to take cognizance of the legislative declaration that the legislation is necessary for public health, welfare, and convenience in Milwaukee county, while no such recognition has been given to the problems of other counties. We thus conclude that the classification is proper in that it is based on substantial and real differences from other classes and that the classification on the basis of population is germane to the purpose of the law.

The high concentration of population could well have compelled the legislature to conclude that a county-wide refuse system was practicable in Milwaukee county but impracticable in other counties where the problem was essentially confined to isolated urban areas. These factors, taken as a whole, impel us to the conclusion that legislative treatment different from that accorded to other counties was reasonable in dealing with the problem of refuse in Milwaukee county. This legislation in no way affects the system of government itself, and the minor variation that is thus allowed obviously takes into consideration the impracticability of such a variation from the present norm to compel county-wide refuse systems in all portions of the state.

The appellants contend that the court should order a fact finding to determine whether or not conditions in Milwaukee county make it necessary to have an additional waste-disposal facility. They conclude that, if the additional facility is unnecessary, the special treatment accorded to counties of over 500,000 violates the county uniformity clause. This finding, however, has already been made by the legislature. It has determined that it is necessary and has merely left to the county the option of when to exercise the powers that the legislature considers to be imperative. Since the county board has proceeded to implement the authority given to it by the legislature, no fact-finding function remains to the court unless there appears a patent unreasonableness. Such unreasonableness does not appear.

* * *

Are the proposed bonds being issued for a public purpose

The appellants' final contention is that the county general-obligation bonds necessary for the financing of the

incinerator would raise money not to be expended for a public purpose. The rule in Wisconsin is, of course, an exacting one, and this court has sharply limited the spending of public funds and has insisted that the levy of taxes and the expenditure of a government's money be for public purposes only.

We stated in *Heimerl v. Ozaukee County* (1949), 256 Wis. 151, 158, 40 N.W. 2d 564:

"Taxation for a private purpose is prohibited by the clause of the federal constitution that guarantees to every state a republican form of government (sec. 4, art. IV), as such a form of government forbids the raising of taxes for anything but a public purpose."

In *State ex rel. Thomson v. Giessel, supra,* page 215, we quoted with approval the rule appearing in 81 C.J.S., *States,* p. 1149, sec. 133:

". . . a public purpose, is a question for the legislature to decide, with respect to which it is vested with a large discretion, which cannot be controlled by the courts unless its action is clearly evasive. . . . Where a doubt exists whether the purpose of an appropriation is public or private, it will be resolved in favor of the validity of the appropriation. . . ."

In *State ex rel. Thomson v. Giessel, supra,* page 215, this court quoted with approval the rule stated in an early Wisconsin case, *Brodhead v. Milwaukee* (1865), 19 Wis. 658 (*624):

" 'To justify a court in declaring a tax void, and arresting proceedings for its collection, the absence of all possible public interest in the purposes for which the funds are raised must be so clear and palpable as to be immediately perceptible to every mind.' "

There is no doubt, of course, that to spend public funds for garbage disposal is clearly for a public purpose. 15 McQuillin, *Municipal Corporations* (3d ed.), sec. 39.21, p. 50.

The essence of the appellants' argument, however, is that, since the county incinerator and waste-disposal plant is an unnecessary duplication of municipal facilities, no possible benefit can be secured by its erection and, hence, the funds are not used for a public purpose. We are, however, faced with the legislative determination appearing in sec. 59.07 (52) (b) that, "The powers conferred by this paragraph are declared to be necessary to the preservation of the public health, welfare and convenience of the county." While it may be argued by the appellants that no additional refuse facilities are necessary, we are not convinced beyond peradventure that this is so, nor if it is so now, that it will continue to be in the future contemplated by the legislature. Only if it is "clear and palpable" that there can be no benefit to the public is it possible for a court to conclude that no public purpose exists. We quoted with approval in *State ex rel. Thomson v. Giessel,* p. 216, *Carmichael v. Southern Coal & Coke Co.,* 301 U.S. 495, 514, 57 Sup. Ct. 868, 81 L. Ed. 1245:

" '. . . whether the present expenditure serves a public purpose is a practical question addressed to the lawmaking department, and it would require a plain case of departure from every public purpose which could reasonably be conceived to justify the intervention of a court.' "

We are satisfied that this tax, applying the above tests, is designed to raise funds to be expended for a public purpose.

By the Court. — Order affirmed.

MEMORANDUM DECISION

(Circuit Court — *Formal Parts Omitted*)

(Those portions of the decision relating to three other causes of action not involved in this petition, have been omitted)

5.) As applied to counties having a population of 500,000 or more, does section 59.07 (52) (b), violate the provisions of the State Constitution (1) authorizing the legislature to confer on county boards of supervisors of the several counties of the state powers of a local, legislative and administrative character and (2) requiring the legislature to establish but one system of town and county government "which shall be as nearly uniform as practicable"?

Here the question is whether the classification of counties under section 59.07 (52) (b) on the basis of population is valid.

State ex rel. Milwaukee County v. Boos, 8 Wis. (2d) 215, 221, 222, 223, 99 N.W. (2d) 139, concerned the validity of the law creating and relating to the office of county executive in each county having a population of 500,000 or more.

The court there summarized its position on matters involving sec. 23, Art. IV of the State Constitution, as applied to county government, stating: "* * * This position encompasses two distinct aspects. First: One system of county government shall be established. Second: The systems adopted by the legislature shall be as nearly uniform as practicable. While there may be a variation in carrying out the specific duties in county government, there can be no variation in the system itself." The court stated further: "This court is not unmindful of the prac-

ticable problems existing in the carrying out of government functions in counties varying in size and character, i. e., urban, rural, semirural, and semiurban. However, the changes referred to can only be in the particulars of county government and not in the substantive character or nature of county government. Thus, a statute allowing counties to exercise an option to adopt a commission form of government was held unconstitutional in *State ex rel. Adams v. Radcliffe* (1934), 216 Wis. 356, 257 N.W. 171. Changes in county government may be made where it is not practicable to carry on such government in a particular class of counties in the same manner as is carried on in other counties, provided there is a reasonable basis for diversity and the powers, duties, and functions of the county board remain the same. Accordingly, the classifications of counties according to population was held proper. *Bingham v. Board of Supervisors of Milwaukee County* (1906), 127 Wis. 344, 106 N.W. 1071, and *State ex rel. Scanlan v. Archibold* (1911), 146 Wis. 363, 131 N.W. 895."

The application of the law to a class of counties having a population of 500,000, or more, the court held, did not violate the constitutional requirement that the one system of county government shall be as nearly uniform as practicable.

Certain provisions of the law (held to be severable) which established an independent executive branch of government with veto power over the acts of the county board, resulting in a check-and-balance system of government for counties having a population of 500,000 or more, whereas in all other counties both legislative and executive powers are vested solely in the county board, were held invalid as repugnant to the constitutional man-

date that there shall be but one system of county government.

Although the constiutional issue in *Bingham v. Board of Supervisors of Milwaukee County,* 127 Wis. 344, 347, 348, 349, 106 N.W. 1071, concerned sec. 31, Art. IV, (prohibiting special and private laws) a law authorizing the building and construction of viaducts across valleys, gullies, running streams or railroad tracks by counties in the state having a population of 150,000, or more, and for the issuing of bonds therefor, was held not to be a special or private law within the constitutional prohibition, based on a classification of counties by population.

In this connection the court said: "The general rules governing classification have been frequently stated, and may be said to be briefly as follows: The classification must be based on substantial and real differences in the classes, which are germane to the purpose of the law and resonably suggest the propriety of substantially different legislation, the legislation must apply to each member of the class, and the classification must not be based on existing circumstances only, but must be so framed as to include in the class additional members as fast as they acquire the characteristics of the class. * * * * If this question related to cities instead of counties, then there would seem to be no doubt that it should be answered in the affirmative. That large and populous cities need better, safer and more expensive highways and bridges for the accommodation of their teeming populations than small communities no one will deny. * * * Classification of cities by population, and the enactment of general laws for each class according to its needs, has been so often approved by this court that it has become part of the fundamental laws of the state. *State ex rel.*

Risch v. Trustees, supra. (121 Wis. 44, 98 N.W. 954.) No good reason is perceived why the same considerations, in a somewhat modified degree perhaps, do not justify classification of counties by population as well as cities."

> "But, apart from these decisions, it seems apparent that a county of more than 150,000 population is quite certain to contain densely populated areas requiring means of intercommunication by way of highways and bridges far more elaborate and expensive than those which will fully satisfy the modest needs of a sparsely settled county, devoted principally to farming and containing only a few villages of small population. So we reach, without serious difficulty, the conclusion that the classification of counties by population in the law before us is germane to the subject covered by the law, and that the characteristics of the class suggest the propriety of such a law as applicable to the class, while refusing it to other counties not in the class."

The grant of powers upon the boards of supervisors "of the several counties of the state" authorized in sec. 22, Art. IV Const., plaintiffs state, means all counties of the state; this, they say, is the basis for the rule in the *Boos case* that as to a particular class of counties there may be changes where it is impracticable to carry on such county government in the same manner as it is carried on in other counties, provided there is reasonable basis for the diversity and the powers, duties and functions of the county board remain the same. Hence, they state, and variations in county systems of government (sec. 23, Art. IV) and variations in county board powers (sec. 22, Art. IV) are interrelated and must be considered together. (See *Kroeplin v. County of Milwaukee,* 180 Wis. 424, 190 N.W. 454.)

In contending that section 59.07(52)(b) violates these constitutional provisions plaintiffs note that these constitutional issues were neither raised nor discussed in the *Bingham case* and suggest that all cases involving classification of counties where the validity of the legislation has been sustained involved variations in the system of county government, not powers conferred on county boards. *State ex rel. Scanlan v. Archibold,* 146 Wis. 363, 131 N.W. 895.

Kroeplin v. County of Milwaukee, 180 Wis. 424, 427, 428, concerned *powers* conferred on county boards. The legislation there involved conferred upon counties having a population of 250,000 or more (then only Milwaukee County) power to regulate places where non-intoxicating liquors, as defined in ch. 441, Laws 1921, were sold. The question directly before the court was whether the law violated sections 22 and 23, of Art. IV of the State Constitution.

The court said:

> "The regulations of places where non-intoxicating liquors, as defined in ch. 441, Laws 1921, are sold is well within the police power of the state. That power may be delegated to counties provided the system of town and county government remains 'as nearly uniform as practicable.' Sections 22, 23 Art. IV, Const. Those sections read as follows:
>
> "Section 22. The legislature may confer upon the boards of supervisors of the several counties of the state such powers of a local, legislative and administrative character as they shall from time to time prescribe.
>
> "Section 23. The legislature shall establish but one system of town and county government, which shall be as nearly uniform as practicable.

"We are met at the threshold with the question as to whether the constitutional prohibition in sec. 23 is offended by ch. 321, Laws 1909, in so far as it attempts to confer upon counties having a population of 250,000 or more, alone, power to regulate such places. * * * "

The legislation was held invalid in that it withheld similar authority from counties having a less population *where it was not impracticable to grant it to them.* There was no reasonable basis for the classification.

There it was said:

"Here we have in the constitution an express command and prohibition to establish but one system of town and county government, 'which shall be as nearly uniform as practicable.' Any other system is unconstitutional. It is by this express command and prohibition that we must test the validity of the act of the legislature in its attempt to delegate authority to one county of the state to enact certain police legislation, and withholding such authority from every other county in the state. Is this giving to the counties of the state a system of government as uniform as practicable? To state the question in another way: Is it not entirely practicable to give all the counties of the state the same power that is attempted to be given to *Milwaukee County* alone?

"We have examined these questions with care, and have searched in vain for any reason, practical or otherwise, for breaking the system of uniform county government in the delegation of such police powers. The need for such legislation in *Milwaukee County* may be greater than it is in other counties in the state, but the law is optional there, as it would be if applied to other counties. The need for legislation in one county of the state does not make it impracticable to vest the power in other counties of the state. The county board of supervisors is the

judge of the necessity of the local legislation in *Milwaukee County,* and there is no reason apparent why the county boards of other counties should not be allowed to exercise the same judgment.

"It is a matter of public knowledge that there are many licensed places under ch. 441, Laws 1921, in other counties of the state as well as in *Milwaukee County*. If the evils appertaining to such places are necessarily to be restrained in one county, they are likewise necessarily to be restrained in any other place where found. The reasons for applying restrictive measures are of the same kind, if not in the same degree, in every county in the state. * * * "

Similarly, in *Milwaukee County v. City of Milwaukee,* 223 Wis. 674, 678, 679, 271 N.W. 399, the validity of a statute requiring any county having a population of 500,000 or more to provide hospitalization to indigents in cases of communicable disease and providing that the cost shall be charged to and paid by the municipality in which the communicable disease is suspected or diagnosed as such, was challenged as violating the constitutional requirement of uniformity in county government.

There it was said:

"It is next urged that ch. 416, as applied to counties having a population of five hundred thousand or more, is so out of harmony with the system of county governments embraced by the law in other counties, that the law is not as nearly uniform as practicable, and therefore offends against sec. 23, of art. IV, of the constitution. Having in mind the fact that ch. 416 relates to and deals with the matter of communicable diseases, the situation of Milwaukee County is such that a uniform system of government is not practicable, at least it is within the province of the legislature to so declare.

* * * *

> "In regard to public health, therefore, it seems that Milwaukee County by reason of population is in a situation where it is impracticable to deal with the problem created by communicable diseases in the same way that it is impracticable to deal with it in more remote and sparsely settled regions of the state. A like situation would exist in any other county of equal population. * * * *
>
> "Ch. 416 being a general law and not a local bill and not offending the constitutional provision in relation to uniformity of county and town government because the basis of classification is germane to the purpose of the act, it is a valid enactment and the trial court correctly so held."

This case, like the *Kroeplin case,* concerned legislation conferring powers on counties classified on a population basis. The same principles were applied. Each affected the system of uniform county government. In the latter case, however, it was not impracticable for all counties to exercise like powers; hence, there was no reasonable basis for the classification and the legislation violated the constitutional requirement of such uniformity.

Section 59.07 (52) (b) contains a legislative finding that the powers conferred by the statute are necessary to the preservation of the public health, welfare and convenience of the county. The court is constrained to the conclusion that the statute is valid; that it does not violate the constitutional requirement that there shall be one system of county government which shall be as nearly uniform as practicable.

* * *

7.) In *Heimerl v. Ozaukee County,* 256 Wis. 151, 40 N.W. (2d) 564, a statute (section 86.106) which authorized towns, cities and villages to build, grade, drain, surface and gravel private roads and driveways and further

authorized counties to contract with municipalities to perform such work was held unconstitutional as authorizing the appropriation and expenditure of public funds for a private purpose. The court found that there was no direct advantage accruing to the public and the statute would authorize municipalities to engage in private business.

The purpose of the general obligation bond financing in this case, plaintiffs allege in the third cause of action, is not a public purpose. In support of this conclusion they allege that none of the plaintiff municipal corporations, or taxable property situated therein, will derive any benefit from such financing or the construction of waste-disposal facilities nor will any benefit be derived by municipalities not parties to this suit which have their own facilities or have contracted for such service. By reference they allege the existence of facilities or contractual relations to service all territory in the County.

The plaintiffs, in short, maintain that these allegations of non-benefit and the existence of facilities and contractual relations to service all territory within the County are allegations of fact, the verity of which are admitted on demurrer. On such record, they submit, the court cannot make any determination as to whether any benefits will be derived by the construction of a county incinerator plant.

The demurrant states that a public purpose is to be considered and determined in terms of the benefit of the subject to the *inhabitants* of the municipality and its objective in the promotion of their general welfare, security, prosperity and contentment, citing definitions from *Davis v. City of Taylor,* (Tex.) 67 S.W. (2d) 1033, and *City Affairs Committee of Jersey City v. Board of*

Com'rs of Jersey City, 46 A. (2d) 425. Insofar, then, as it is not alleged that the operation of incinerator facilities by the County will be of no benefit to the inhabitants or citizens of the County, it is claimed that the third cause of action is legally insufficient. It is true that nowhere is it alleged in the complaint that the inhabitants or citizens of the County will derive no benefit from the operation of incinerator facilities by the County. But a municipality is frequently defined as a legally incorporated association of inhabitants of a limited area for local government or a body of people gathered together in one mass, having a community of interests because residents of the same place. *State ex rel. Attorney General v. City of Avon Park* (Fla.) 149 So. 409, 412; *Clark v. Holt* (Ark.) 237 S.W. (2d) 483, 485; *Reid v. Wiley,* 46 N. J. L. 473, 474; *State ex rel. McIntire v. City Council of City of Libby* (Mont.) 82 P. (2d) 587. Likewise a county is a muncipality as that term is used in the statutes.

Under the liberal rules for the construction of pleadings on demurrer, too familiar to require citation, it would seem that the allegation in the third cause of action that no benefits will be derived by the municipalities from the operation in question must be held to mean and include the inhabitants and citizens of the municipalities.

A public purpose has for its objective the promotion of public health, safety, morals, security, prosperity, contentment and general welfare of all inhabitants of the municipality; a purpose is also said to be public if the object is beneficial to the inhabitants and directly connected with the local government; or if it is for the support of government or for any of the recognized objects of government. *Platte Valley Public Power and Irrigation Dist. v. Lincoln County* (Neb.) 14 N.W. (2d) 202,

205; *City Affairs Committee of Jersey City v. Board of Com'rs of Jersey City, supra; Davis v. City of Taylor, supra; Jamison v. City of Charlotte* (N. C.) 80 S.E. (2d) 904, 914.

"It has been said that the term 'public purpose' is merely a classification distinguishing objects for which the government is to provide from those which are left to private inclination, interest or liberality." 51 Am. Jur. section 326, Taxation.

In *State ex rel. McClure v. Magerman* (Ohio) 98 N.E. (2d) 835, in considering "public purpose" the court said: "Generally, a public purpose has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity nad contentment of all the inhabitants or residents within the municipal corporation. * * *" That statement was quoted and approved in *Jeffrey Co. v. Milwaukee,* 267 Wis. 559, 575, 66 N.W. (2d) 362.

In *DeArmond v. Alaska State Development Corp.,* Alaska, 376 P. (2d) 717, it is said that whether a public purpose is being served must be decided as each case arises and in light of the particular facts and circumstances of each case. See also *In re Queen's Hospital,* 15 Haw. 663; *Moskal v. Catholic Bishop of Chicago* (Ill.) 43 N.E. (2d) 206.

McQuillin, Municipal Corporations, (3rd ed.) Vol. 15, section 39.19 states: "While the question of what is and what is not a public purpose is initially a legislative responsibility to determine, in its final analysis, it is for the courts to answer." See also 51 Am. Jur. Taxation, section 339.

It is stated in section 59.07(52)(b):

> "The powers conferred by this paragraph are declared to be necessary to the preservation of the public health, welfare and convenience of the county."

This declaration is a determination by the legislature that the subject and the function of waste-disposal by counties having a population of 500,000 or more is a public purpose. It would logically follow that it is a determination that applicable taxing and borrowing powers are for a public purpose.

The question of public purpose as applied to eminent domain was before the court in *David Jeffrey Co. v. Milwaukee,* 267 Wis. 559, 579, 66 N.W. (2d) 362:

> "* * * The presumption is that such use is public if the legislature has declared it to be such. The decision of the legislature must be treated with the consideration due to a co-ordinate department of the government of the state. 18 Am. Jur., Eminent Domain, p. 675, sec. 46.
>
> "The determination of what constitutes a public municipal purpose is primarily a function of the legislative body, subject to a review by the courts, and such determination by the legislative body will not be overruled by the courts except in instances where that determination is manifestly arbitrary or unreasonable. *State ex rel. Gordon v. Rhodes* (1951), 156 Ohio St. 81, 100 N.E. (2d) 225."

A constitutional question was before the court on summary judgment in *Associated Hospital Service v. Milwaukee,* 13 Wis. (2d) 447, 473, 474, 109 N.W. (2d) 271. There the court said:

> "Whether or not this court, when confronted with an issue of the constitutionality of a statute, will require a judicial investigation through trial of facts, or whether it will inform itself through independent

research and the taking of judicial notice, is something that lies entirely within the court's sound discretion. In the recent case of *White House Milk Co. v. Reynolds* (1960), 12 Wis. (2d) 143 106 N.W. (2d) 441, this court also exercised its discretion to have a judicial determination of facts made in a case presenting an issue of constitutionality of legislation. In the instant case we can see no necessity of having further evidence adduced at the trial court level.

* * * * *

"We hesitate to lay down any rule governing the exercise of discretion by trial courts, when confronted with an issue of constitutionality of a statute on demurrer or motion for summary judgment, in determining whether to direct that a judicial inquiry into the facts bearing on constitutionality be had by trial. In considering such a problem a trial court must keep in mind that it is better practice for it to assume the statute is constitutional until the appellate court has passed upon it except where unconstitutionality is apparent beyond a reasonable doubt. *State v. Stehlek* (1953), 262 Wis. 642, 645, 56 N.W. (2d) 514."

Polanski v. Eagle Point, 30 Wis. (2d) 507, 141 N.W. (2d) 281, was an action to recover real estate brought by a special administrator. The deceased during his lifetime conveyed certain real estate to the town of Eagle Point, allegedly as a condition to the granting of general relief and admittance to the county hospital. The special administrator offered to compensate the town for the relief funds expended, but the town refused to accept reimbursement and reconvey the property. The defendant demurred. The demurrer was based on the contention that the town acquired title by adverse possession. The demurrer was sustained.

The plaintiff contended that it was beyond the legislatively delegated power of the town to possess the property, and, therefore, in a legal sense, it could not be in possession and occupancy of the property so as to create an adverse use. In this connection the plaintiff asserted that the acquisition was not for a public purpose and concluded that on demurrer that allegation must be accepted as a verity. To this contention the court said: "We do not agree since whether a particular act or conduct is a 'public purpose' is a matter of law and not of fact. Legal conclusions are not admitted on demurrer."

The reports are replete with cases uniform in stating the principle of presumptive constitutionality of legislation and the general rule that a statute cannot be declared unconstitutional unless it clearly so appears or appears so beyond a reasonable doubt. It has been said that this general rule is peculiarly applicable to the question of whether or not a legislative act authorizing a tax levy is for a public purpose. 51 Am. Jur. section 339, Taxation.

In *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 81 L. ed. 1245, 57 S. Ct. 868, it is said:

> "This restriction upon the judicial function, in passing on the constitutionality of statutes, is not artificial or irrational. A state legislature, in the enactment of laws, has the widest possible latitude within the limits of the Constitution. In the nature of the case it cannot record a complete catalogue of the considerations which move its members to enact laws. In the absence of such a record courts cannot assume that its action is capricious, or that in its informed acquaintance with local conditions to which the legislation is to be applied, it was not aware of facts which afford reasonable basis for its action. Only by faithful guidance to this principle of judicial

review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function."

In *People ex rel. McDavid v. Barrett* (Ill.), 19 N.E. (2d) 356, the court said:

" * * * What is for the public good and what are public purposes are questions which the Legislature must in the first instance decide. In so doing it is vested with a large discretion, which the courts cannot control, except where its action is evasive of or contrary to some prohibition of the Constitution. * * * If it can be seen that the purpose sought to be obtained is a public one and contains the elements of public benefit, the question how much benefit is thereby derived by the public is one for the legislature and not the courts. Taylor v. Thompson, 42 Ill. (8) 9; Citizens' Savings & Loan Ass'n. v. Topeka, supra; Daggett v. Colgan, 92 Cal. 53, 28 P. 51, 14 L. R. A. 474, note, 27 Am. St. Rep. 95. In determining whether or not the sovereign taxing power is used in the public interest, the judgment of the Legislature is to be accepted, in the absence of a clear showing that the purported public purpose is but an evasion, and that the purpose is, in fact, private. * * * "

See also *Jennings v. City of St. Louis,* 58 S.W. (2d) 979; *State ex rel. Chase v. Clausen* (Wash.) 188 P. 538; 51 Am. Jur., section 339, Taxation.

And see also 51 Am. Jur., section 340, Taxation, and *Bradentown v. State* (Fla.) 102 So. 556, *Burnett v. Greene* (Fla.) 122 So. 570, and *City of Daytona Beach v. King* (Fla.) 181 So. 1.

The third cause of action alleges a claim of unconstitutionality. As noted before, the plaintiffs submit that the court cannot, without proof, draw any conclusion as

to whether any benefits will be derived by the construction of a county incinerator plant, which is the factual basis of the alleged cause of action. The County maintains that the allegations in this respect are not legally sufficient, in any event, to justify a finding that the action of the legislature in determining and declaring the operation of waste-disposal facilities by counties having a population of 500,000 or more to be a "public purpose" is manifestly arbitrary or unreasonable, directing the court's attention to the rule that a statute may be declared invalid only when its constitutional repugnance is clear and beyond a reasonable doubt.

In *State v. Stehlek,* 262 Wis. 642, 645, 56 N.W. (2d) 514, the court said:

> "It is a fundamental (sic) principle of statutory construction that a regularly enacted statute, or order of an administrative body, made pursuant to a statutory authority will be presumed to be constitutional until it has been declared to be otherwise by a competent tribunal. Such presumption is raised by the fact of the enactment of the statute by the legislature, and it extends to everything in the act on which it is based. The party attacking the statute has the burden of overcoming the presumption and showing that the statute is unconstitutional. The burden does not shift, because of the difficulty in proving it. 16 C. J. S., Constitutional Law, pp. 250-260, sec. 99.
>
> "The exercise of the power to declare laws unconstitutional by inferior courts should be carefully limited and avoided if possible. The authorities are to the effect that unless it appears clearly beyond a reasonable doubt that the statute is unconstitutional, it is considered better practice for the court to assume the statute is constitutional, until the contrary is decided by a court of appellate jurisdiction. * * * "

If there was any question that these principles were properly matters for consideration on demurrer it was set to rest in *Associated Hospital Service v. Milwaukee, supra.* There the trial court is reminded that in considering a question of unconstitutionality *on demurrer* it is better practice for the trial court to assume the statute is constitutional until the appellate court has passed upon it *except where unconstitutionality is apparent beyond a reasonable doubt.* After careful consideration, the court concludes that the invalidity of the statute here is not apparent beyond a reasonable doubt. Doubt is not legally sufficient.

The question is vexatious since it is an exception to the usual procedure on demurrer.

The court is constrained to the conclusion, then, that the demurrer to the legal sufficiency of the third cause of action must be sustained.

* * *

In accordance with the foregoing opinions and conclusions:

(1) Defendant's general demurrers to the first, second and third causes of action are respectively sustained;

(2) Defendant's general demurrer to the fourth cause of action is overruled.

An order in conformity herewith may be presented. Without costs.

Respectfully submitted,

Elmer W. Roller
Circuit Judge

Dated: September 12th, 1967.